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Supreme Court, U.S.
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No. 04-555

IN THE

Supreme Court of the United States

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC., *et al.*,

Petitioners,

v.

THE CITY OF LONG BRANCH, NEW JERSEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CITY OF LONG BRANCH, NEW JERSEY

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QUESTIONS PRESENTED FOR REVIEW

1. Is the issue raised in Petitioner's Petition for a Writ of Certiorari moot, inasmuch as the challenged zoning ordinance, 20-6.13, was superceded by ordinance 47-02, which adopted the distinctly different "City of Long Branch, Broadway Development Plan" in October, 2002, thus the relief requested, the enjoinment of ordinance 20-6.13, is no longer available?

2. Did Petitioner's Petition for a Writ of Certiorari fail to set forth appropriate grounds for review by this Honorable Court, in that Petitioner failed to cite any conflicts between the Decision of the United States Court of Appeals for the Third Circuit and those decisions of the other Circuits or New Jersey Courts, and, in that that zoning ordinance 20-6.13 does not violate the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et. seq.* and is not Unconstitutional?

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STATEMENT OF THE CASE

The sole issue in this case is the District Court's denial of Petitioner's request to enjoin enforcement of zoning ordinance 20-6.13, which was affirmed by the Third Circuit. Not only is the Third Circuit's decision in conformity with the applicable law, the determinations from other Circuits and the facts of this case, but this issue has been *mooted* by the City of Long Branch's October 2002 adoption of ordinance 47-02, which promulgates its "Broadway Development Plan" and supersedes the ordinance challenged here.

A. Factual Background

Petitioner's version of the facts of this case is incomplete and otherwise inaccurate. Notably, Petitioner makes no mention whatsoever of ordinance 47-02, which promulgates the "Broadway Development Plan," and which supersedes ordinance 20-6.13.

Petitioners-Plaintiffs, the Lighthouse Institute and Reverend Kevin Brown [hereinafter collectively known as "The Lighthouse Institute"], alleges in its Complaint, that on March 1, 1992, it began renting space at 159 Broadway, Long Branch, New Jersey and utilized this property for Bible studies, public prayer meetings, community services and to provide meals to the homeless. On November 8, 1994, the Lighthouse Institute purchased the property at 162 Broadway The property at 162 Broadway has never been used as a church, although Petitioner-Plaintiff Reverend Kevin Brown has illegally occupied it as a residence.

1. The Lighthouse Institute and Challenged Zoning Ordinance 20-6.13.

The property known as 162 Broadway is located in what was at that time, the City's C-1 Commercial District, and which is now a part of the Broadway Redevelopement Plan. City zoning ordinance 20-6.13, which was effective until superceded in October 2002, set forth certain uses permitted as of right or by Conditional Use Permit, in the C-1 District. Churches were not listed as permitted or conditional uses in zoning ordinance 20-6.13. The City's purpose in enacting zoning ordinance 20-6.13 was to rejuvenate the C-1 zone as a viable commercial area.

On August 1, 1995, the Lighthouse Institute submitted a Development Application for 162 Broadway seeking a use variance for: (a) soup kitchen; (b) Institute; (c) job skills training programs; (d) counseling center; and, (f) life skills classes (A. 217). The City Zoning Board/ Planning Board advised the Lighthouse Institute by letter of August 21, 1995 that its application was incomplete. The Lighthouse Institute did nothing further with regard to this particular application. Starting in early 1997, the City of Long Branch granted numerous other Zoning Permits for 162 Broadway, including permits for use of the property as offices for the Lighthouse Institute and as a retail clothing store.

On April 26, 2000, the Lighthouse Institute submitted an application for a Zoning Permit to use 162 Broadway as a church (A. 228). The Zoning Officer denied the application pursuant to Sections 345-14 and 345-42 of the City of Long Branch Zoning Ordinance, in that the proposed use was not specifically permitted in the C-1 zone without a use variance. The Lighthouse Institute did not submit an application for a

variance nor did it file the requisite appeal to the Zoning Board of Adjustment, as required by the New Jersey Municipal Land Use Law and the City of Long Branch's Zoning Ordinance. Instead, on June 8, 2000, the Lighthouse Institute filed the above-referenced Complaint against Respondents-Defendants City of Long Branch [hereinafter known as "the City"], BCIC Funding Corporation, Breen Capital Services, Inc., Abrams, Gatta & Falvo, P.C., Peter S. Falvo, Esq. and Eugene M. LaVergne, Esq. in the Superior Court of New Jersey, Monmouth County.

2. The Superceding "City of Long Branch, Broadway Development Plan," of October, 2002.

However in October 2002, the "City of Long Branch, Broadway Development Plan," [hereinafter known as "the Plan"] was adopted by ordinance 47-02, which superseded ordinance 20-6.13. The documents comprising this comprehensive redevelopment Plan are set forth in the Record (A. 433-475). The Lighthouse Institute's property at 162 Broadway, and indeed the area previously covered by challenged ordinance 20-6.13, is included in the Plan (A. 436).

Among the objectives set forth in the Plan as an entirety, are to strengthen retail trade and city revenue, increase employment opportunities, improve public facilities in commercial areas, improve the City's image, attract more retail and service enterprises, achieve shared parking and encourage mixed commercial and residential use (A. 436, 437). To implement the Plan, property acquisition is necessary and among those properties to be acquired within the next six months is 162 Broad Street (A. 438, 439).

Also, as a consequence of the Plan, the prior forms of former zone C-1 and the Zoning Board of Adjustment, to which appeals of zoning decisions were to be made, no longer exist.

The Lighthouse Institute never challenged the Broadway Redevelopment Plan prior to its enactment. The Lighthouse Institute's application to the City Council of the City of Long Branch for an amendment to the Plan permitting churches, was denied by resolution. The denial of an amendment to the Plan is not challenged by the Lighthouse Institute here. Instead, the Lighthouse Institute challenges prior zoning ordinance 20-6.13.

B. Procedural History

This case originated as a challenge to the City of Long Branch zoning ordinance no. 20-6.13. The Lighthouse Institute initiated this action by Complaint filed on June 8, 2000 in the Superior Court of New Jersey, Monmouth County Law Division at no. MON-L-2729-00, against the City of Long Branch, BCIC Funding Corporation, Breen Capital Services, Inc., Abrams, Gatta & Falvo, P.C., Peter S. Falvo, Esq. and Eugene M. LaVergne, Esq. This case was removed to the District Court of New Jersey and assigned Docket No. 00-Civ-003366 (WHW). The Lighthouse Institute filed an Amended Complaint on October 23, 2000. The gist of the Lighthouse Institute's allegations, is that zoning ordinance 20-6.13 which does not expressly permit the location of a church in the C-1 commercial zone, violated the federal and state constitutions and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq.* (RLUIPA).

By orders of April 4, 2003, the District Court denied both the Lighthouse Institute's Motion for Preliminary Injunction against the City and BCIC (the subject of this appeal), and Motion for Summary Judgment, and granted in part the City and Falvo's respective Motions for Summary Judgment. The District Court determined that the Lighthouse Institute's claim that the ordinance was facially unconstitutional, was ripe for decision.

The Third Circuit affirmed the District Court by order dated May 28, 2004, and, denied the Lighthouse Institute's Petition for Rehearing.

REASONS FOR DENYING THE PETITION

I. The Injunctive Relief Sought by the Lighthouse Institute is Moot.

The Lighthouse Institute's Factual History of this case as set in its Petition for a Writ of Certiorari, fails to disclose the crucial fact that the challenged zoning ordinance 20-6.13 has been entirely superseded and subsumed, by the Broadway Redevelopment Plan adopted by ordinance 47-02 in October, 2002. Consequently, the relief requested, an injunction against the City of Long Branch from enforcing zoning ordinance 20-6.13, has been entirely moot for the past two years. Zoning ordinance 20-6.13 no longer exists.

If a claim no longer presents a live case or controversy at stages of certiorari and appellate review, the claim is deemed moot, and the federal courts lack jurisdiction. *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). Mere voluntary cessation of allegedly illegal conduct does not in itself moot a case. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 288-290,

102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982). However, where there is no evidence that the defendants intend to reenact the allegedly unconstitutional legislation, a mootness determination is appropriate.

Here, the newly enacted Broadway Redevelopment Plan is of such different scope, terms and breadth than the challenged zoning ordinance 20-6.13, that it is self-evident that the City of Long Branch has not simply reenacted the same allegedly objectionable provision in a different form. Moreover, the Lighthouse Institute has not alleged that the new Plan is objectionable as akin to the challenged zoning ordinance; in fact, they have not disclosed the new Plan's existence to this Honorable Court.

This Honorable Court has a policy of avoiding the unnecessary adjudication of federal constitutional questions. *City of Mesquite, supra*, 468 U.S. at 294. This policy would be served by this Court declining to review the mooted issue of the District Court's refusal to order injunctive relief as to a superseded zoning ordinance, and, as to property now contained within a comprehensive redevelopment plan.

II. The Lighthouse Institute Fails To Demonstrate Any Conflicts Between The Third Circuit's Decision, The Other Circuits And The New Jersey Courts As To The Constitutionality of Zoning Ordinance 20-6.23 And, That This Ordinance Does Not Violate The Religious Land Use And Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et. seq.*

The Third Circuit correctly affirmed the District Court's decision denying an preliminary injunction enjoining the enforcement of zoning ordinance 20-6.13, inasmuch as the Lighthouse Institute did not satisfy its burden of demonstrating a likelihood of success on the merits, or indeed the other requisites for a preliminary injunction.

A movant seeking a preliminary injunction must establish that he is reasonably likely to prevail eventually in the litigation; that he is likely to suffer irreparable injury without relief; that granting the injunction will not result in irreparable harm to the non-moving party and/or that harm to the moving party outweighs the harm to the non-moving party; and (4) that granting the injunction is in the public interest; *S & R Corp. v. Jiffy Lube Int'l*, 968 F. 2d 371, 374 (3d Cir. 1992). "All four factors should favor preliminary relief before the injunction will issue." *S&R Corp.*, *supra*, at 374. The Lighthouse Institute failed to demonstrate any of these factors here, thus the Third Circuit properly affirmed the denial of the injunction.

The Lighthouse Institute argues that zoning ordinance 20-6.13 violates RLUIPA on its face, in that it prohibits churches, which the Institute defines as "religious assemblies," in the C-1 district, but permits "assembly halls," which the Institute defines as "nonreligious assemblies."

The Lighthouse Institute relies upon *Midrash Sephardi v. Young Israel of Bal Harbor, Inc.*, 366 F.3d 1214 (11th Cir. 2004) for its proposition that the decision of the Third Circuit here causes a conflict amongst the Circuit Courts. To the contrary, the Third Circuit's decision does not conflict with *Midrash*, or any other Circuit Court decision. The Third Circuit properly affirmed the District Court's denial of a preliminary injunction, in accordance with the law and facts of this case.

In *Midrash*, a Florida case, the plaintiff synagogue congregations, whose zoning variance and special use permits had been denied, challenged town zoning ordinances under RLUIPA. The Eleventh Circuit held that inasmuch as the challenged ordinance permitted private clubs and lodges, but excluded religious assemblies, it violated RLUIPA's equal terms provision, and reversed the summary judgment entered on behalf of the town. Unlike here, a grant of summary judgment to the town was at issue, and the Florida District Court's decision was reviewed on that basis, not as to a denial of a preliminary injunction.

Crucial to the decision in *Midrash*, was the ordinance language involved. In *Midrash*, the zoning ordinance itself essentially defined the term "private club" as including assemblies. Specifically, a "private club," was *defined in the ordinance* as "a building and facilities or premises, owned and operated by a corporation, association, person or persons for social, educational or recreational purposes, but not primarily for profit and not primarily to render a service which is customarily carried on as a business." 366 at 1231. Another town ordinance *specifically grouped* churches and synagogues with "places of assembly."

Accordingly, in *Midrash*, the Court found that the ordinance's definition of private club comported with a natural and ordinary understanding of "assembly," and concluded that churches and synagogues fall within that perimeter. *Id.*. The Court concluded that the ordinance, which permitted private clubs and other secular assemblies but not churches or synagogues, constituted a violation of § (b)(1) of RLUIPA, and, was not neutral or generally applicable. As with the "grouping" of churches and synagogues as "assemblies," the language of the town's own ordinance in *Midrash* essentially internally conceded that the entities were "similarly situated."

Unlike the instant case, the town ordinance in *Midrash itself provided* the specific definitions upon which the Court relied to find that private clubs and churches/synagogues are "similarly situated." Here, in contrast to *Midrash*, no definition for the term "assembly hall" is provided in zoning ordinance 20-6.13, nor does any City ordinance "group" or otherwise define churches and other religious institutions as "assemblies." Indeed the Lighthouse Institute itself applied for a use variance as a "Church," not an assembly, thus did not classify itself as an assembly at the time application was made. Moreover, the Lighthouse Institute's definitions of "assemblies," above, are self-serving.

Here, also unlike *Midrash*, no evidentiary record was developed in the District Court by the Lighthouse Institute, which never requested an evidentiary hearing. The limited record here contains no evidence that the City allowed only assemblies of the secular sort in the C-1 district. The Third Circuit specifically noted the "dearth of evidence" in the record before the District Court, as to whether the secular uses identified by the Lighthouse Institute were "similarly

situated." There was no evidence that churches were treated less favorably than nonreligious institutions in this case. The Third Circuit reasoned that the Lighthouse Institute had failed to demonstrate that it would be prohibited from operating in the district as an assembly, thus could not show that it was treated on non-equal terms than a nonreligious assembly.

In contrast, in *Midrash*, the Eleventh Circuit relied upon an extensive District Court Record in making its determination. For example, the Court observed that the plaintiffs presented evidence that synagogue members regularly patronized area shops, that congregations purchased food and supplies and that they contributed to the stated purpose of the town to promote retail activity and synergy in the business district. The record in *Midrash* also showed that the town did not provide evidence to demonstrate that private clubs did not promote the goals of the ordinance.

Third Circuit's decision does not conflict with the "equal terms" or "free exercise" analysis employed in *Midrash*. Zoning ordinance 20-6.13 does not facially discriminate against churches and in favor of nonreligious land use. Ordinance 20-6.13 does not prohibit conduct because it is undertaken for religious purposes. Inasmuch as churches are only one of numerous uses which are not specifically permitted, and, in that the purpose of the ordinance 20-6.13 was to promote economic revitalization, not impair or prohibit certain speech, the ordinance is a neutral law of general application. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

Ordinance 20-6.13 does not impose a substantial burden on the Lighthouse Institute's exercise of religious freedom: at the most, the ordinance, only incidentally affects or inconveniences the Lighthouse Institute. The right of "Free Exercise" does not exempt an individual from the obligation to comply with a valid and neutral law of general applicability which prohibits conduct that a state is free to regulate. *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 139 (3d Cir. 2002). There is no violation of the "equal terms" provision because churches, places of worship and other religious assemblies are permitted uses in other areas of the jurisdiction of the City as a whole, without the variance requirement, and the Lighthouse Institute has failed to produce any evidence to show that zoning ordinance 20-6.13 treats religious and nonreligious institutions unequally or discriminatorily.

Consequently, the Third Circuit's decision affirming the denial of a preliminary injunction, does not conflict with that of the Eleventh Circuit in *Midrash*, nor decisions from any other Circuit Court. The Lighthouse Institute clearly could not prevail on its claims that zoning ordinance 20-6.13 violated RLUIPA.

Additionally, the Lighthouse Institute could not prevail on its claims that the presumptively valid zoning ordinance 20-6.13 was unconstitutional, inasmuch as the City of Long Branch demonstrated a compelling, legitimate governmental interest in revitalizing its C-1, core commercial district and that the failure to enumerate a church as a specifically permitted use in this district advances this interest. The City likewise demonstrated that the zoning regulation was no more expansive than necessary to further this interest inasmuch as a church is not a prohibited use in the C-1 zone, rather than

a specifically prohibited use, and is a use requiring a variance from the Zoning Board.

The Lighthouse Institute was also unable to show that the City of Long Branch violated the Lighthouse Institute's right to free speech or expression, freedom of assembly, or the Establishment Clause. Ordinance 20-6.13 in no way regulated land use based upon the content or viewpoint of proposed use or limited the right to assemble with others, in that the Lighthouse Institute and its members are free to worship virtually anywhere else in the City. The purpose of ordinance 20-6.13 was to revitalize the C-1 district as a commercial center, a purpose which has nothing to do with inhibiting or promoting religious expression. Nor could the Lighthouse Institute prove a violation of "equal protection." Again, ordinance 20-6.13 did not facially categorize by race, gender or national origin, the Lighthouse Institute is not a member of a suspect class, nor is a fundamental right impinged upon. The classifications were rationally related to the City's legitimate interest in revitalizing C-1 as a commercial center.

Thus, the Lighthouse Institute clearly could not prevail on its claims that the presumptively valid zoning ordinance 20-6.13 was unconstitutional. Consequently, the Third Circuit properly affirmed the District Court's denial of a preliminary injunction.

CONCLUSION

For the foregoing reasons, Respondent the City of Long Branch respectfully requests that the Petition for a Writ of Certiorari file by the Petitioners, be denied.

Respectfully submitted,

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